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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORY TAIT, Plaintiff, vs. ASSET ACCEPTANCE, LLC, GORDON & WONG LAW GROUP, P.C., GORDON & WONG LAW GROUP, P.C., AS SUCCESSOR IN INTEREST TO PECK & RAY, LLP, AND DOES 1 TO 10, Defendants.	CASE NO. CV12-9532 MWF (FFMx) **NOTICE OF MOTION AND MOTION TO DISMISS AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANTS** Date: January 28, 2013 Time: 10:00 a.m. Crtrm.: 1600 The Honorable Michael W. Fitzgerald

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 28, 2013, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 1600 of this Court, which is located at 312 N. Spring Street, Los Angeles, California, 90012, the Honorable Michael W. Fitzgerald presiding, defendants Asset Acceptance, LLC ("Asset") and Gordon & Wong Law Group, P.C., both individually and as successor in interest to Peck & Ray, LLP ("Gordon & Wong") ("Defendants") will and hereby do move this Court for an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the claims made against it in the Amended Complaint.

This motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place telephonically on December 10, 2012. Counsel for Asset and Counsel for Gordon & Wong informed counsel for Tait that Defendants intended to file a motion to dismiss on the grounds that all of the claims are barred under the *Rooker-Feldman* doctrine.

This motion is made on the grounds that the Amended Complaint fails to state facts sufficient to constitute a cause of action against Defendants under any of the theories that have been plead.

The Motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities and Request For Judicial Notice in Support of the Motion, all of the other papers on file in this action, and such other and further evidence or argument as the Court may allow.

DATED: December 20, 2012 SIMMONDS & NARITA LLP

By: s/Lindsey A. Morgan
Lindsey A. Morgan
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Individually and as successor in interest
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DATED: December 20, 2012

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I. INTRODUCTION

In 2004, plaintiff Gregory Tait ("Tait") was served with the summons and complaint in a lawsuit that had been filed against him in the Superior Court of California, County of Los Angeles, by defendant Asset Acceptance, LLC ("Asset").[1] Tait never responded to the complaint. On August 27, 2004, the court clerk entered a default judgment against Tait and in favor of Asset in the amount of $3,670.57. Tait has never moved to set aside the judgment.

On October 5, 2012, Tait filed his complaint in this action, and in response to Defendants' motion to dismiss, he filed an amended on November 27, 2012. See Docket No. 10. Tait wants the trier of fact in this Court to find that: 1) he was never served with the state court complaint, 2) the judgment against him was "fraudulently obtained" and is therefore "invalid," and 2) his account was wrongfully levied by defendant Gordon & Wong Law Group, P.C. (individually and as a successor in interest to Peck & Ray, LLP) ("Gordon & Wong"). In other words, Tait is pursuing claims which would require this Court to make factual findings that would directly undermine the validity of the state court judgment entered against him. The judgment is based upon a finding that Tait was properly served with the complaint, that he does owe the debt, and that he is liable to Asset in the amount of $3,670.57.

Tait cannot prevail on his claims in this Court without attacking the findings that underlie the judgment. The *Rooker-Feldman* doctrine bars claims like these,

[1] A copy of the complaint filed against Tait in *Asset Acceptance, LLC v. Gregory W. Tait*, case number 04E01629, Superior Court of California, County of Los Angeles (hereinafter, the "State Court Action"), and the proof of service of the summons and complaint, are attached as Exhibits A and B, respectively, to the Request For Judicial Notice In Support Of Defendants' Motion To Dismiss ("RJN").

made by state court losers, like Tait, who file subsequent federal court actions that seek to undermine state court judgments.[2]

The claims here are also barred by the doctrine of collateral estoppel. Even a judgment obtained by default is conclusive as to all the issues raised by the complaint. Thus, the state court judgment and the findings that underlie it are as binding on Tait as if the judgment had been entered after a full trial on the merits. For each of these reasons, Defendants respectfully request that the Court grant this motion to dismiss all of the claims in the Amended Complaint. Further, because Tait has already had an opportunity to amend his claim, granting him leave to amend will be futile. The Amended Complaint should be dismissed without leave to further amend.

II. STATEMENT OF FACTS

A. The State Court Action

On February 4, 2004, the attorneys at nonparty Peck & Ray, LLP ("Peck & Ray") filed a lawsuit against Tait to attempt collection efforts on the judgment on Asset's behalf. *See* RJN, Ex. A. Peck & Ray hired a process server to serve Tait with the summons and complaint. *See* RJN, Ex. B. After making several attempts to personally serve Tait, the process server perfected substituted service on him by leaving the summons and complaint with Susan Bell, Tait's co-tenant, on June 18, 2004, and by mailing to Tait that same day copies of the Summons and Complaint, Notice of Case Assignment, Alternative Dispute Resolution Package, and Declaration of Personal, Family and Household Obligations. *See* RJN, Ex. B.

On August 23, 2004, Asset filed a request for entry of default judgment against Tait. *See* RJN Ex. C. On August 27, 2004, the court clerk entered judgment against Tait and in favor of Asset in the amount of $3,670.57. *See* RJN Ex. D. Asset thereafter filed a Writ of Execution on January 3, 2005. *See* RJN Ex. E.

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[2] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

B. The Federal Court Action

On October 5, 2012, Tait filed the present action in Los Angeles Superior Court. Asset removed the action to this Court on November 7, 2012 and moved to dismiss the Complaint on November 14, 2012. *See* Docket 5. Tait then filed his Amended Complaint on November 27, 2012. *See* Docket 7.

Tait alleges that Defendants failed to properly serve him, either by personal service or substituted service. Amended Complaint, ¶¶ 23-28. He claims that a judgment was entered against him, and that based on "the fraudulently procured judgment" the Defendants "fraudulently procured a Writ of Execution to levy Plaintiff's bank account" and that they wrongfully obtained $869.42 from his account. *See id.* at ¶¶ 30-32.

III. ARGUMENT

A. Legal Standard

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed if it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The Federal Rules of Civil Procedure provide little guidance on what a plaintiff must do to "state a claim" for relief, other than Rule 8, which says that a complaint must set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." *Id*.

The Supreme Court decisions in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) ("*Twombly*"), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) ("*Iqbal*") represent a significant shift in the analytical framework that courts must use when evaluating motions to dismiss. In *Twombly*, the Court expressly rejected the "no set of facts" test that had been articulated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See Twombly*, 550 U.S. at 562-63. The Court clarified that although "detailed factual allegations" are not required at the pleading stage, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. The complaint must contain factual allegations, and they "must be enough to raise a right

to relief above the speculative level." *Id.* There must be sufficient facts pled to state a claim to relief that is "plausible on its face." *Id*. at 570.

The Supreme Court refined its analysis even further in *Iqbal*, reiterating that Rule 8 requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. Only a complaint that states "a plausible claim for relief" can survive a motion to dismiss. *Id.* at 679. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. A complaint that contains facts which are "merely consistent with" defendant's liability is not sufficient, because it "stops short of the line between possibility and the plausibility of entitlement to relief. *Id*. (citations and quotation marks omitted).

The court should not assume the truth of legal conclusions in the complaint. *Id*. Thus, the first step when evaluating a motion to dismiss is to identify the legal conclusions, because they "are not entitled to the assumption of truth. While legal conclusions can provide the framework for a complaint, they must be supported by factual allegations." *Id*. at 679. Next, with respect to any "well-pleaded factual allegations" in the complaint "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* The determination of whether a plausible claim for relief has been stated is "a context-specific task" that requires a court to "draw on its judicial experience and common sense." *Id.*

Dismissal is therefore proper under Rule 12(b)(6) where a court finds either: 1) the lack of a cognizable legal theory; or 2) the absence of sufficient facts alleged under a cognizable legal theory. *See Johnson v. Riverside Healthcare Sys., L.P.*, 534 F.3d 1116, 1121 (9th Cir. 2008). As the Ninth Circuit has observed: "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and

reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

Tait has not pled facts sufficient to support a plausible claim for relief against Defendants under any of the statutory provisions cited in his Amended Complaint consistent with the pleading requirements of Rule 8 and the decisions in *Iqbal* and *Twombly*. The Amended Complaint must be dismissed.

B. The Law Governing The *Rooker-Feldman* Doctrine

The *Rooker-Feldman* doctrine applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005). "The purpose of the doctrine is to protect state judgments from collateral federal attack." *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1029 (9th Cir.2001). *Rooker-Feldman* prevents litigants from attacking the finding underlying a state court judgment by filing a subsequent federal lawsuit, "no matter how erroneous or unconstitutional the state court judgment may be (citations)." *Kelly v. Med-1 Solutions, LLC*, 548 F.3d 600, 603 (7th Cir. 2008). The *Rooker-Feldman* doctrine "applies not only to claims that were actually raised before the state court, but also to claims that are **inextricably intertwined** with state court determinations." *Id*. (citation omitted, emphasis added).

Thus, the *Rooker-Feldman* doctrine can apply even if the plaintiff has not explicitly referred to the state court judgment, nor directly contested the merits of the judgment. A claim made in federal court is "inextricably intertwined" with a state court decision and constitutes an impermissible *de facto* appeal if "the adjudication of the federal claims would **undercut the state ruling or require the district court to interpret the application of state laws or procedural rules** . . . ." *Reusser v. Wachovia Bank, N.A.*, 515 F.3d 855, 859 (9th Cir. 2008) (emphasis added), *quoting*

Bianchi v. Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003); *see also Doe & Associates*, 252 F.3d at 1030 ("Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined.").

In *Kelly*, the plaintiffs alleged that the state court judgments obtained by defendants included sums for attorneys' fees that were not permitted by contract or law. *See Kelley,* 548 F.3d at 602. According to Plaintiffs, their FDCPA claims were not barred by the *Rooker-Feldman* doctrine, because they were only challenging "defendants' *representations* and *requests* related to attorney fees, and not the state court judgments granting those requests." *Id*. at 604. The *Kelly* court rejected this argument, however, noting that the state court had already determined the attorney's fees were proper, and the district court lacked jurisdiction to rule that the holding was erroneous:

> Because defendants needed to prevail in state court in order to capitalize on the alleged fraud, the FDCPA claims that plaintiffs bring ultimately require us to evaluate the state court judgments. We could not determine that defendants' representations and requests related to attorney fees violated the law without determining that the state court erred by issuing judgments granting the attorney fees.

Id. at 605.

This Court, and other district courts in California, have held that the *Rooker-Feldman* doctrine bars litigants from pursuing FDCPA claims based on the allegation that a default judgment was improper because the debtor was not served, or claims based on the allegation that the debtor does not owe the debt as adjudicated by the state court. *See Grant v. Unifund CCR Partners, et al.,* 842 F. Supp. 2d 1234 (C.D. Cal. 2012); *Bryant v. Gordon & Wong Group, P.C.*, 681 F. Supp. 2d 1205 (E.D. Cal. 2010); *Williams v. Cavalry Portfolio Services, LLC*, 2010 WL 2889656 (C.D. Cal. July 20, 2010); *Fleming v. Gordon & Wong Law Group, P.C.*, 723 F. Supp. 2d 1219 (N.D. Cal 2010).

In *Grant*, plaintiff filed FDCPA and state law claims against a debt buyer, alleging that the default judgment entered against her was improper, because she

allegedly was never served with the complaint, did not owe the money, and because the judgment was based on "false and fraudulent" affidavits. *See Grant*, 842 F. Supp. 2d at 1239. This Court held that all the claims were barred by *Rooker-Feldman*:

> Were the Court to rule that Unifund CCR committed any of those alleged wrongs, it "would undercut the state ruling" that plaintiff was in fact served with a copy of the summons and complaint, owed the debt to Unifund CCR, and authorized Unifund CCR to execute a Writ of Execution. Accordingly, pursuant to the Rooker– Feldman doctrine, the Court cannot entertain any claims premised on those alleged wrongs.

Id. (citation omitted).

In *Bryant*, the plaintiff sued a law firm under the FDCPA and Rosenthal Act, claiming he had never been served with the collection complaint, and that "out of the blue" he discovered his checking and savings accounts had been garnished. *See Bryant*, 681 F. Supp. 2d at 1206. The court noted that by "disputing the garnishment of his accounts, Plaintiff is inherently challenging the entry of default against him and the writ of execution that authorized the garnishment." *Id*. at 1208. Summary judgment was granted for defendant under the *Rooker-Feldman* doctrine, because plaintiff's claims sought to undermine the judgment entered against him:

> The net effect is that Plaintiff is seeking to undermine the state court judgments. These judgments were rendered before the current district court proceeding, and any action by this Court in favor of Plaintiff on his FDCPA or RFDCPA claims would necessarily require review of those state court judgments. The *Rooker-Feldman* doctrine specifically bars this Court from doing so. If Plaintiff believes he has been wronged by the actions of the state court, he must turn to the state for remedy. This Court lacks jurisdiction to provide redress for Plaintiff's claims.

Id.

Similarly, in *Williams*, the plaintiff's FDCPA claims challenged a default judgment entered against him in a collection action. *See Williams*, 2010 WL 2889656 at *1. He claimed he had never been served with the complaint, and that he did not owe the money. *Id.* at *3. This Court observed that plaintiff's claims hinged on two issues: 1) whether plaintiff was liable for the debt, and 2) whether plaintiff

was properly served. *Id.* In finding the plaintiff's claims barred by *Rooker-Feldman*, this Court reasoned:

> By way of default judgment, the state court found that Plaintiff was properly served and that he is liable for the debt. [citation omitted]. For this Court to exercise jurisdiction over these claims would be to review and undermine the state-court judgment. Plaintiff is essentially the losing party in state court who seeks relief from the default judgment. Such relief is precluded by *Rooker-Feldman*. [citations omitted].

See id.

Finally, in *Fleming*, plaintiff alleged that a law firm had violated the FDCPA by attempting to garnish an amount that was not authorized by the Writ of Execution issued following entry of a default judgment. *See Fleming*, 723 F. Supp. 2d at 1222-23. The court rejected the claim and granted summary judgment for defendant. "To evaluate Plaintiff's claim, the Court must determine the validity of the $1869.00 debt recognized by the state court in the May 2009 Writ of Execution. . . . [T]here is no question that the *Rooker- Feldman* doctrine bars a district court from reviewing an FDCPA claim that challenges the validity of a debt authorized by a state court judgment." *Id.*

C. Tait's Claims Are Barred By The *Rooker-Feldman* Doctrine

Every one of Tait's claims seeks to attack the validity of the state court judgment against him.[3] Tait claims he was never served with the summons and complaint in the State Court Action, and thus the judgment against him was "fraudulently obtained" and therefore is "invalid." *See* Amended Complaint, ¶¶ 30-31, 34, 47, 52. When the state court entered judgment against Tait, however, it necessarily found that he had been properly served. *See* RJN, Ex. D ("Having been

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[3] Tait brings claims for violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq*. ("FDCPA"); the California Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§ 1788, *et seq.;* the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et seq.*; the California Consumer Credit Reporting Agencies Act, Cal. Civ. Code §§ 1785, *et seq*.; and the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq*.

served with a copy of the summons and complaint and having failed to answer complaint of plaintiff . . . "); *see also* Cal. Code Civ. Proc. § 585(a) (requiring proper service upon defendant before judgment by default may be entered); *see also Bryant*, 681 F. Supp. 2d at 1208; *Williams*, 2010 WL 2889656 at *3.

In order to prevail here, Tait must ask this Court to make a finding that is directly contrary to the findings that underlie the judgment. He is requesting that the Court decide that he was never served, that the failure to serve was intentional, and the judgment was obtained by fraud and is "invalid." His claims for unfair debt collection and credit reporting practices rely upon this requested finding. His claims are "inextricably intertwined" with the judgment, because an adjudication in his favor here "would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules . . . ." *See Reusser*, 515 F.3d at 859; *see also Bryant*, 681 F. Supp. 2d at 1208; *Williams*, 2010 WL 2889656 at *3.

Tait also claims that the levy on his bank account was improper. *See* Amended Complaint, ¶¶ 31-33, 57. Again, the state court entered judgment against Tait and in favor of Asset. It has adjudicated that he does, in fact, owe the debt. *See* RJN, Ex. D. Tait has never moved to set the judgment aside. Asset had a legal right to enforce the judgment using the Writ of Execution, and therefore Tait cannot claim that his funds were improperly obtained pursuant to the Writ. *See Bryant*, 681 F. Supp. 2d at 1208; *Fleming*, 723 F. Supp. 2d at 1222-23.

Here, as in *Grant, Kelly*, *Bryant*, *Williams* and *Fleming*, each claim that Tait seeks to pursue require him to establish facts that would undermine the validity of the state court judgment. The Court cannot credit these claims without holding that the state court erred when it entered judgment for Asset. The *Rooker-Feldman* doctrine prevents the Court from exercising subject matter jurisdiction over Tait's claims. *See Bianchi*, 334 F.3d at 898 (district court lacks subject matter jurisdiction if claims raised in federal action are inextricably intertwined with state court decision). Dismissal of Tait's action is proper.

D. Tait's Claims Are Barred By Collateral Estoppel

The result is the same if Tait's claims are analyzed under traditional principles of collateral estoppel. Tait is estopped from pursuing claims in this action which conflict with the state court's findings that he was properly served with the state court complaint, and that he is liable to Asset for the amount of the judgment. As the California Supreme Court recently observed:

> The doctrine of collateral estoppel, or issue preclusion, is firmly embedded in both federal and California common law. It is grounded on the premise that 'once an issue has been resolved in a prior proceeding, there is no further fact-finding function to be performed.' (*Parkland Hosiery Co. v. Shore* (1979) 429 U.S.322, 336, fn. 23, 99 S.Ct. 645, 58 L.Ed.2d 552). 'Collateral estoppel ... has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy, by preventing needless litigation.'

Murray v. Alaska Airlines, Inc., 50 Cal. 4th 860, 864 (2010) (citation omitted). Where, as here, there is a subsequent action between two parties involving different claims, collateral estoppel "operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action." *Id*. at 867.

Tait may argue that nothing was "actually litigated" in the State Court Action, because Asset obtained a judgment by default. This is incorrect. Federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 81 (1984); 28 U.S.C. § 1738. California law is clear that a default judgment will satisfy the "actually litigated" requirement of collateral estoppel as to all issues that were necessary to the entry of the judgment. *See, e.g., People v. Simms*, 32 Cal. 3d 468, 481 (1982) ("Even a judgment of default in a civil proceeding is res judicata as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint") (internal quotation marks

omitted) (citing *Fitzgerald v. Herzer*, 78 Cal. App. 2d 127, 131 (1947)); *see also In Re Green*, 198 B.R. 564, 566 (B.A.P. 9th Cir. 1996) (same; applying California law).

Thus, the judgment in the State Court Action has preclusive effect even though Tait never responded to the complaint. *See, e.g., Fitzgerald,* 78 Cal. App. 2d at 132 ("A judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer."); *In re Younie*, 211 B.R. 367, 374-75 (B.A.P. 9th Cir. 1997) (applying California law; giving collateral estoppel effect to a default judgment on fraud claim entered after debtor failed to respond).

Here, Tait's claims are barred by collateral estoppel, because he is seeking to re-litigate issues that were conclusively established against him in the State Court Action. The default judgment against Tait was based upon a finding that he was served with the complaint, that he failed to respond to it, and that Asset was entitled to the judgment amount against him. The levy was valid because it is based upon the judgment. Tait cannot pursue claims in this case which seek to adjudicate that he was not served with the complaint, that the judgment should be set aside, or that his funds were improperly obtained by the writ.

IV. CONCLUSION

All of the claims asserted by Tait fail because they are barred as a matter of law by the *Rooker-Feldman* doctrine and by principles of collateral estoppel. For the foregoing reasons, the Court should dismiss Tait's Amended Complaint. Further, Tait has already amended his complaint, and there clearly are no additional facts he can plead which will allow him to clear the *Rooker-Feldman* hurdle. The motion to dismiss should be granted without leave to amend. Judgment should be entered for Defendants.

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DATED: December 20, 2012

SIMMONDS & NARITA LLP
TOMIO B. NARITA
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DATED: December 20, 2012

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